

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WESTERN TOWBOAT COMPANY,)	C20-0416-RSM
)	
Plaintiff,)	March 22, 2024
v.)	11:00 a.m.
)	
VIGOR MARINE, LLC,)	Motions
)	(Via Zoom)
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Plaintiff: J. STEPHEN SIMMS
Simms Showers LLP
201 International Circle
Suite 230
Baltimore, MD 21030

For the Defendant: DAVID R. BOYAJIAN
Schwabe Williamson & Wyatt
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101

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1 MARCH 22, 2024 - MORNING SESSION

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3 THE DEPUTY CLERK: Please come to attention. The
4 United States District Court for the Western District of
5 Washington is now in session, the Honorable Judge Ricardo S.
6 Martinez presiding.

7 THE COURT: Ms. Staples, good morning. Can you hear
8 me?

9 THE DEPUTY CLERK: Yes, sir, I can hear you.

10 THE COURT: I think I heard you earlier doing a sound
11 check with everybody else, including our court reporter.

12 THE DEPUTY CLERK: Yes, sir.

13 THE COURT: All right. You may call our case.

14 THE DEPUTY CLERK: This is the matter of Western
15 Towboat versus Vigor Marine, Cause Number C20-416, assigned
16 to this Court.

17 Counsel, please make your appearances for the record.

18 MR. SIMMS: Your Honor, Steve Simms for Western
19 Towboat, and with us on the line is J.D. Stahl, who is our
20 local counsel, and my colleague, Gary Murphy.

21 THE COURT: I guess it's "good afternoon" for you,
22 Mr. Simms. It's "good morning" still over here.

23 MR. SIMMS: Your Honor, it's actually "good morning."
24 I'm in the San Francisco Bay visiting with our new grandson
25 and daughter-in-law, on, when I'm not arguing, childcare

1 duty.

2 THE COURT: Congratulations.

3 MR. BOYAJIAN: Congratulations, Steve.

4 Dave Boyajian for Vigor. My partner, Molly Henry, is also
5 on the line listening in.

6 THE COURT: Mr. Boyajian, Ms. Henry, thank you. Will
7 you be arguing or presenting on behalf of Vigor?

8 MR. BOYAJIAN: I will, Your Honor.

9 THE COURT: Okay. Counsel, I've had a chance to
10 review all of the materials submitted by the parties. You're
11 quite aware we have -- the issue the Court is focused on has
12 to do with the appropriate amount of attorneys' fees and
13 costs in this very interesting case. I'm quite familiar with
14 the case. In fact, I went back and re-read some of the
15 materials on this trial that we had some time ago.

16 So here's what I need: We have different categories that
17 we really need to discuss and talk about whether they apply
18 or don't apply and how they do that. I think the easiest way
19 for me to do this is simply to ask you a series of questions.
20 I've got several things written down here in terms of
21 questions and different categories that might help me.

22 And since we're on this Zoom platform, this is maybe a
23 little easier than if people were in the actual courtroom.
24 No need to be at the podium, and I'm just going to bounce
25 back and forth between the two parties here, and that would

1 help me in reaching my decision on this particular case.

2 So let's first talk about no award here because insurance
3 paid. And let me just start out by -- Mr. Simms, maybe I'll
4 start with you. If you had both got insurance separately
5 without the involvement of the other side, would this even be
6 an issue in terms of the attorneys' fees here?

7 MR. SIMMS: Well, that was that *Grays Harbor* case
8 that the Vigor side cited, and that's what makes the
9 difference here, which is that the insurance was the inherent
10 part of the consideration of the contract and waiver of
11 subrogation. And that's what the Court looked at in your
12 decision, which is at Docket 108, at page 10, and concluded
13 that there was nothing to be reimbursed or paid or damages or
14 whatever to Vigor that they never paid, and it didn't.

15 And as a matter of fact, we know that because the Vigor
16 claims person, in-house, when she testified, she said, "Yeah,
17 this is how we got to the \$100,000. We paid out up to the
18 deductible, attorneys' fees mostly." She didn't know --
19 Carter what's-her-name didn't know exactly how much it was,
20 but after that, the insurers took over entirely. And so
21 that's the distinction with *Grays Harbor*, because in *Grays*
22 *Harbor*, it wasn't part of the consideration. Either side had
23 their own insurance. Not the same issue.

24 And the Ninth Circuit, in our opinion -- we went up, and
25 here we are back -- looked at that and said, yeah, this is

1 not a collateral-source issue. This is a consideration
2 issue, and there's not a single bit of proof that the
3 insurers -- anybody but the insurers paid anything else but
4 the \$100,000, and Vigor has already gotten the attorneys'
5 fees that it laid out as part of the \$40,000 that Western has
6 paid.

7 THE COURT: All right. Before I turn to your
8 opponent here, let me ask you another question on that.
9 Wasn't my ruling originally limited only to damages?

10 MR. SIMMS: That was the only thing that was before
11 you, but the ruling carries directly over to the question of
12 who gets the money. Let's -- you know, it's probably more of
13 a -- just a question that will never be answered, but who's
14 paying for everybody on the Vigor side to be here? I'll
15 betcha it's not Vigor. It will be the insurers that pay, and
16 it has been the insurers that paid, just as they paid NOAA or
17 anybody else. And so that is why Your Honor's decision at
18 Docket 108, page 10, carries over to here. It's the same
19 thing.

20 You can't -- to put it another way, let's say that the
21 Court said, "Yes, Vigor, you get \$1,572,457.03," which is the
22 claim. It comes back to Vigor. That's double recovery or at
23 least -- yeah, it's a double recovery, whether it's part of
24 the \$40,000 or it's part of the over \$100,000 that was paid,
25 because they've already been -- that money already has been

1 paid. It wasn't something that Vigor paid.

2 THE COURT: All right. Final question for you,
3 again, before I allow your opponent to respond: Why include
4 the provision for attorneys' fees in your agreement if that
5 was meant to be covered or set off by insurance? Why add
6 that?

7 MR. SIMMS: Well, it was. First, it's not -- we're
8 not -- from this standpoint, from who paid and who,
9 therefore, can recover, that's not a focus of the tow
10 contract, okay? It's simply a fact. It's simply a fact that
11 Vigor never paid the insured the attorneys' fees over and
12 above \$100,000, including in the \$40,000.

13 But the insurance contract does say -- sorry, the tow
14 contract, under Clause 8 -- that basically everybody's
15 responsible for their own stuff, and that was, again, part of
16 Your Honor's decision, that you take care of your own stuff.

17 Now, if this had been, you know, just all about a standard
18 contract dispute, which it was after Your Honor held that
19 there wasn't standing at the time to go forward with the NOAA
20 stuff, then we wouldn't have a million-five claim. We
21 wouldn't have anything like this, and maybe Vigor wouldn't
22 have presented it to the insured's company and maybe they
23 would have paid out their own attorneys' fees above the
24 deductible, but they didn't.

25 THE COURT: All right. Mr. Boyajian.

1 MR. BOYAJIAN: There's a lot here, Your Honor. Let
2 me start with one critical piece. Your ruling on collateral
3 source didn't discuss fees. It didn't discuss law on fees.
4 It was a damages question. That is entirely separate from a
5 right-to-attorneys'-fees question.

6 You raise a good point, I think, a particularly good
7 point. Well, before I get there, let me just say this: This
8 argument feels belated. This is an entitlement-to-fees
9 argument. This is Mr. Simms arguing and Western arguing that
10 Vigor is not entitled to recover fees because insurance paid
11 it. We've already had that motion, Your Honor, and you've
12 already ruled on it. You said Vigor is entitled to collect
13 its reasonable fees and costs. If this argument was to be
14 made, it should have been made then. This is another example
15 of waiting until decisions have been made and then Western
16 saying, "Oh, shucks, I forgot to point out something about
17 the contract."

18 Now, turning to the merits of this argument, you're
19 exactly right. If we adopt this position, Clause 15 in the
20 tow contract is meaningless. And let's remember whose tow
21 contract it is. This is Western Towboat's standing tow
22 contract. We didn't modify it; we just signed it. This is
23 what they called for. We want you to procure this insurance,
24 and that insurance does cover, in certain types of lawsuits,
25 for claims, environmental claims maybe, attorneys' fees.

1 Western Towboat is intimately familiar with what a P&I
2 policy covers, and it covers defense costs of tort claims.
3 So, in Clause 8, Western Towboat says the parties have to
4 have P&I. Separately and later, in Clause 15, Western
5 Towboat's contract form says, if we get in a fight, the
6 winning party gets their fees and costs. If Clause 8 is
7 meant to preclude any party from having to pay their fees and
8 costs because they buy the type of insurance that covers
9 legal fees, why include Clause 15, which is explicit and
10 clear and can only otherwise be read as meaningless in the
11 face of Clause 8.

12 Now, when we get to the cases supporting this, Western
13 doesn't cite a single case supporting this proposition. Not
14 one. Not one case that says, if a contract says you have to
15 have insurance, and insurance pays the fees, you don't get to
16 recover.

17 *Grays Harbor* and *Blakely Island*, both of which we cited,
18 specifically say there is no merit under Washington law to
19 the argument that Western Towboat is making here, and again,
20 it's too late. This is an entitlement-to-fees question, and
21 it should have been an argument raised in the prior motion
22 where Your Honor ruled that Vigor won and Vigor is entitled
23 to recover reasonable costs and fees.

24 What we are here to do is talk about lodestar calculation.
25 That's the method Washington courts use. It's a reasonable

1 hourly rate -- and Western doesn't challenge our rates --
2 multiplied by the reasonable number of hours expended in
3 light of the controversy before the Court.

4 And no matter how many times Western, in its briefing and
5 in their declarations, try and say this is a \$187,000 tow
6 claim on a contract, we were there. You were there. That's
7 not what this case was about. There was a
8 hundred-million-dollar tail wagging this dog up until six
9 days before trial when Your Honor issued a summary judgment
10 ruling, and that ruling was appealable all the way through
11 and past the conclusion of trial, so that issue was never
12 taken off the table.

13 So what we need to talk about, Judge, since you've already
14 ruled we're entitled to collect, is -- our fees are
15 reasonable -- how many hours were reasonable to defend a
16 nine-figure lawsuit?

17 THE COURT: All right. Let me follow up on that.
18 Obviously, the attorneys' fees that are being requested here
19 are almost 1.5 million compared to the \$40,000 in damages
20 awarded at trial because we had such limited issues by the
21 time we got there. That is pretty disproportional.

22 MR. BOYAJIAN: I don't disagree, Your Honor, if we
23 look at that and pretend that's what this case was about.
24 But let's think about it this way: You have a \$100 million
25 claim, and a party successfully defends it and takes nothing,

1 right? They get zero dollars, but they've won. Are they not
2 entitled to collect fees to defend that \$100 million lawsuit
3 because they took nothing? I don't see a case anywhere that
4 says that.

5 What lodestar says, instead, Judge, is that you look at
6 what were the issues, what was the complexity of the issues,
7 what was the potential damages at stake or implicated by the
8 case, and what was the benefit to the client? It's not the
9 fact that they recovered \$40,000. It's the fact that they
10 didn't get pinned with sole liability to the federal
11 government, which the federal government was saying, at the
12 time of trial, was \$108 million.

13 Now, the reason that we were in trial at that time is
14 because Western wanted to. If you remember, Judge, and you
15 said you've gone back and looked -- I'm sure you do -- Vigor
16 didn't want this fight, right? Vigor invited Western
17 repeatedly to work cooperatively with Vigor and with NOAA to
18 resolve federal government liability.

19 At that point, we would have had a \$187,000 tow claim,
20 right, because Vigor wouldn't have incurred costs cooperating
21 with NOAA. The parties cooperatively would have handled that
22 \$187,000 tow claim between the two entities that still work
23 together. Western Towboat still pushes drydocks around for
24 Vigor. We would have worked that out. We wouldn't have been
25 here. We tried to get them to cooperate, and then we tried

1 unsuccessfully -- or, no, successfully, to get a tolling
2 agreement in place so that we could resolve \$100 million
3 worth of liability with NOAA before we had to fight about
4 \$187,000.

5 Judge, we never would have seen the inside of your
6 courtroom on a \$187,000 tow dispute. I can assure you that.
7 I resolve those all the time.

8 Then, even during trial, right, we tried to negotiate a
9 tolling agreement at the close of discovery to avoid
10 incurring these kind of fees until NOAA could take that step
11 there, that tail wagging the dog off the table, and when we
12 couldn't negotiate one, Judge, we moved for one. We asked
13 for a stay, and Western opposed it vigorously, and you said,
14 Judge, on Western's opposition, they're the plaintiffs, they
15 have a right to go forward.

16 Vigor never wanted to have this fight over \$100 million.
17 We wanted to put that issue to bed, and then, two entities
18 that had worked together for years and still work together
19 now would have figured out what to do with \$187,000 in tow
20 hire. That's not what we got. It's not what we litigated,
21 so we're not talking about a \$40,000 case. Judge, we're
22 talking about a dec action for potentially \$100 million that
23 was live at trial. You disposed of it six days before, and
24 the reconsideration period ran all the way through trial, as
25 did the appeal period.

1 THE COURT: All right. One short follow-up: In my
2 time at federal court, we've had all kinds of very large
3 cases. Yeah, I understand that NOAA had liability and NMSA
4 issues, but wasn't having seven attorneys on the case,
5 basically, a bit of overstaffing?

6 MR. BOYAJIAN: No, Your Honor, I don't think so at
7 all. So what we're talking about when we say seven attorneys
8 is four different associates who worked on a case that's been
9 on my desk since 2016. Three of those attorneys are no
10 longer even with our firm, right?

11 So, then, what we're really talking about is myself and
12 Noah Jarrett, two maritime practitioners, who worked on this
13 case primarily for the duration. We worked the case up.
14 Primarily, I did. He offered support. We worked as a team,
15 because it was an important case.

16 As we got toward trial and realized NOAA liability was
17 still on the table -- in the negotiations I was having with
18 NOAA, they were, in real time, quoting your interim judgments
19 throughout this case and quoting positions the parties were
20 taking. They were using that to support "We think you ought
21 to pay this much, because it seems like the litigation is
22 going this way." So this was very real and alive.

23 So as we realized we were not going to resolve NOAA
24 liability and we were going to go to trial, we brought in
25 Mr. Howard. Noah Jarrett and myself are maritime lawyers.

1 We're good at what we do, I like to think. I hope you agree.
2 Mr. Howard had a 30-plus-year trial career with a
3 hundred-plus trials. He has something that lawyers, frankly,
4 in this area don't get. We don't try cases like that.
5 Maritime lawyers do not. And so we waited and waited, hoping
6 we could resolve this case, and when it became abundantly
7 clear that we were going to go try a case with maybe a
8 \$100 million on the line, we brought in trial counsel.

9 Now, Western has pointed out, why didn't we use Seattle
10 lawyers instead of Portland lawyers? Well, Western's lawyer
11 is in Baltimore, and Noah Jarrett and I are in Portland, but
12 when we needed a trial lawyer, we sure found one who lived in
13 Seattle and has experience in Seattle and in Washington
14 federal courts. That was Mr. Howard.

15 Ms. Henry was brought in because, when Mr. Simms and
16 Western moved to exclude our expert witnesses, I couldn't
17 argue that motion. It would have been improper and presented
18 a conflict for me to argue a motion implicating my own work,
19 so Ms. Henry was brought in. She's also a maritime lawyer.
20 So those are the lawyers we brought in, what they did, and
21 why.

22 But at trial, as you'll recall, we had myself and
23 Mr. Jarrett, as maritime practitioners, and we had Mr. Howard
24 as an expert trial counsel, and we had a brand new associate,
25 Mr. Murray, who was helping us do on-the-fly research. I do

1 not think that's overstaffing, Your Honor, for a case of this
2 magnitude.

3 THE COURT: Mr. Simms, I don't need you to basically
4 go over everything you submitted in your memo, but anything
5 you'd like to say in response to counsel?

6 MR. SIMMS: Well, I've got the tow contract right
7 here, and here is Clause 15, and it says, first, the
8 "substantially prevailing party" -- and I want to make clear,
9 there's been no waiver of argument here, we have never given
10 up on this argument, and the contract says what it says, and
11 we've never given up on the question of the direct
12 applicability of Your Honor's decision about collateral
13 source.

14 Interestingly enough, reading the Ninth Circuit opinion,
15 the Ninth Circuit says, yeah, you're right, Judge Martinez
16 was right about that, not awarding anything over damages.
17 We're not talking about collateral source. We're talking
18 about, basically, who paid and who was responsible for
19 paying.

20 But here's Clause 15. It says, "with the substantially
21 prevailing party," 40 percent isn't substantial compared to
22 60 percent, but anyhow, the next part, "to recover its" --
23 and I circled that here -- "its reasonable legal fees and
24 costs." This was not "its" cost. We've never seen a bit of
25 evidence that Vigor paid anything over \$100,000. We've never

1 seen a bill to Vigor. All that there was was a printout of
2 time. What happened to those bills? I betcha if we saw the
3 real bills -- and it's not a question of privilege now.
4 We're all done with the case. If we saw the real bills and
5 where they went and the money that came back in, it would be
6 from the insurers. Vigor never paid its reasonable -- and
7 there's the other word -- "reasonable" fees and costs.

8 This is making us pay the money for K&L Gates to dig out
9 of the problem with the experts a reasonable cost when,
10 really, what was going on was whether Vigor should change
11 counsel. That's not a reasonable cost.

12 And Jeff (sic) Howard, fabulous lawyer, but there was this
13 business about, oh, they've got him written off because it
14 was pro bono. Well, the Supreme Court is very clear that you
15 can only charge fees and award fees that were paid. So
16 there's two problems with that: First, Jeff's fees weren't
17 paid, says Vigor; second, Vigor didn't pay the fees. It was
18 the insurers.

19 And the *Grays Harbor* case, real different. It was a
20 public utilities case. It was under a Washington statute,
21 but the interesting thing that *Grays Harbor* cites is this
22 *Roats* case, R-O-A-T-S, a landlord/tenant situation where the
23 insurance was not independent, and at the end of the day,
24 there was no attorneys' fees that had to be paid under that.
25 So that's the big difference there.

1 But nothing was waived here. We don't waive any of these
2 arguments, and particularly Your Honor's decision about
3 you've got to pay them to get them, and that didn't happen,
4 except as a part of the \$40,000 that Western already has
5 paid, which was the 40 percent out of the hundred, most of
6 which, apparently, was attorneys' fees to exhaust the
7 deductible.

8 MR. BOYAJIAN: Your Honor, if I may on one or two of
9 those points?

10 THE COURT: Yes.

11 MR. BOYAJIAN: If I can remember how to pick them
12 apart from the rest. Insurance, whether insurance paid,
13 again -- oh, I'm sorry, there's three points I can think of.

14 Whether insurance paid, Your Honor, again, you've already
15 hit on the critical pieces. Why would there be a fees clause
16 if the insurance clause was there expecting everyone to pay?
17 More importantly, have you ever gotten in a car accident,
18 Your Honor? My wife did recently, and my insurance premiums
19 went through the roof, right? So the idea that Vigor pays
20 nothing -- no insurance companies -- as Western Towboat is
21 well aware, because they've had lawsuits under their
22 policies, insurance companies come back and get it one way or
23 another, right? And so the clause would make no sense if the
24 insurance was supposed to pick it up, and under law, if
25 insurance picks it up, there's no fees to recover. The

1 clause would be meaningless. It wouldn't even be in
2 Western's form.

3 But, regardless, it doesn't matter who paid it. It is
4 Vigor's fees. Vigor was the defendant. The fact that they
5 had insurance that may have covered it doesn't change the
6 fact that it was paid out, and at the end of the day,
7 insurance companies get their pound of flesh. The only
8 question is: Should Vigor have to pay it in increased
9 premiums, or should Western, by reimbursing the insurers,
10 take that off Vigor's loss record?

11 Now, to the idea that fees not billed to a client are not
12 recoverable, that's absolutely not what Washington law says.
13 Washington law has several cases in which fees not billed to
14 a client are recoverable and not only in the pro bono
15 representation context.

16 The lodestar method is simply hours times the rate,
17 reasonable number of hours, given the controversy. We know
18 what the controversy really was in this case, so were the
19 hours reasonable? It doesn't say you then have to check to
20 see who paid them, you then have to say -- it doesn't say you
21 then have to see whether Vigor wrote some of them off. It
22 simply says were the hours incurred, and the way the courts
23 judge that is by looking at contemporaneous billing records.

24 Finally, the K&L Gates fee. Happy to talk about that one,
25 because I have to own it and still do. This isn't about

1 Schwabe's recoverable fees. It's about Vigor's, right?
2 Schwabe -- I may have made an error. The Court forgave it or
3 overlooked it, whatever way it went, but at the end of the
4 day, we're not talking about what Schwabe's fees were, we're
5 talking about Vigor. Vigor was in a position where they were
6 at risk of having their experts excluded at trial. If that
7 had happened, my firm would have had no choice but to
8 withdraw from representation based on a conflict, right? We
9 would have had to back out.

10 Trial was fast approaching on a case we had been working
11 for years. K&L Gates had to step in to start getting up to
12 speed in case that came to pass. It didn't come to pass, and
13 so K&L Gates hard-stopped, and Vigor was happy to continue
14 with our representation, which they appreciated. But Vigor
15 should not be penalized because there was a risk that their
16 chosen counsel would have to step aside based on a
17 non-waivable conflict.

18 We're not talking here about what Schwabe's fees were.
19 We're here talking about the fees that Vigor reasonably
20 incurred in a bare-knuckle piece of litigation that Western
21 started, notwithstanding the fact that we had a tolling
22 agreement and that Western kept pressing forward at all
23 possible speed, notwithstanding the fact we could have waited
24 until a \$100 million risk was off the table. Western
25 wouldn't wait, so Vigor had to defend itself.

1 And at the end of the day, Vigor made choices that let it
2 win, right? We can pull back and keep talking about
3 Mr. Simms' displeasure with your ruling on who the
4 substantially-prevailing party was, but that's in the books,
5 as is your ruling that we are entitled to our reasonable
6 costs and fees -- that my client is, not my firm.

7 And so all of these fees are recoverable. The question
8 before the Court is simply lodestar. Our rates haven't been
9 questioned by anyone credible. Mr. Klein certainly isn't.
10 He didn't even review the pleadings. He was advised this was
11 a \$187,000 contract case. I agree, if that was the case,
12 these fees would be unreasonable, but it wasn't the case, and
13 we all know that.

14 THE COURT: All right. Let me follow up on some of
15 that. And maybe these are a bit more minor issues, but I
16 like to work my way through everything.

17 Western argues that Vigor failed to segregate fees,
18 including fees related to the NOAA and appeal preparation.
19 Your response was that, yes, Vigor has already removed it
20 from the charges.

21 MR. BOYAJIAN: Yeah.

22 THE COURT: However, in looking through the fees,
23 there's at least \$27,000 and change in fees listed that were
24 related to the NOAA claim after it was removed by the Court.
25 And then, on the listings in one of your exhibits -- I think

1 it was A2 -- they are not attributed to a specific attorney
2 or person. That makes it kind of impossible to tell me who
3 billed the time.

4 And then your motion says that Exhibit A2 reflects time
5 for which Schwabe did not charge Vigor, so are the fees in A2
6 being claimed here?

7 MR. BOYAJIAN: No, Your Honor, those are fees we did
8 not charge Vigor, I believe. If that's what it says in our
9 motion, then that's what it is.

10 As to claims about entries that have the word "NOAA" in
11 them, I took out \$190,000 plus that are the fees incurred in
12 negotiating with NOAA, but not every single entry that has
13 the acronym "NOAA" in it was devoted to negotiating a
14 resolution with NOAA. Some of those entries, Your Honor, the
15 ones that are left, had to do with trying to deal with how to
16 defend the issue that was raised that was that Vigor ought to
17 be on the hook for all of NOAA fees.

18 Just because the word "NOAA" is in an entry doesn't mean
19 that it is work directed at resolving the claims by NOAA. I
20 have segregated those. I could produce those separately if
21 Your Honor would like those, but just because an entry says
22 the word "NOAA" -- and if you look at them, several of them
23 say, "Call to NOAA," "Research regarding how to sever NOAA's
24 claim with Western," "Research regarding X-Y-Z." They are
25 very minimal bits, looking at the big picture, of what

1 Western was trying to lay at Vigor's feet, which was
2 \$100 million in NOAA liability.

3 This is -- you know, it is the control-F version of
4 reviewing the bills. Look for the acronym "NOAA," and if it
5 shows up, that ought to be excluded? No, Your Honor. I did
6 a careful analysis of what work is reflected in each entry.
7 I removed \$190,000 in fees for that work.

8 THE COURT: All right. Let's talk about Schwabe a
9 little bit, and then I'll have Mr. Simms respond to all of
10 this. Schwabe, basically, in what they call -- they call it
11 a "billing judgment," they wrote off charges. And so
12 Western's argument, of course, is that, you know, you were
13 not actually charged those fees by Schwabe. Your response
14 is, well, yes, but that time was actually incurred in getting
15 a successful result and that Western, therefore, should not
16 get the benefit or the windfall benefit of those courtesy
17 write-offs.

18 You know, why should these write-offs be charged to
19 Western?

20 MR. BOYAJIAN: Sure, Your Honor. So Washington
21 courts allow recovery of documented fees not billed to a
22 client, period. There are plenty of cases out there. We
23 cite more than a few.

24 Lodestar is based on hours expended, not hours billed to a
25 client. Chris Howard's time is accurately reported. It

1 reflects real value, which is the measure under lodestar. So
2 we waited as long as -- what I want to get to, the point is,
3 is that your question about windfall, right, Schwabe ate
4 these fees. For whatever reason, we did. We could take a
5 case pro bono to trial and still recover our fees.

6 In fact, Your Honor, as the head of our firm's pro bono
7 committee, I take cases with no fees to trial, and I am
8 routinely awarded my fees if and when I win on a case where I
9 don't bill a single penny to a client, right? We wrote these
10 down. At the end of the day, those are costs that the
11 Schwabe law firm ate.

12 But why? We did it because we were in a bare-knuckle
13 fight that cost 1.6 million -- or \$1.5-plus million that
14 Western picked, and now Western says, "We don't think we
15 should have to pay any of it, but at the very least, we
16 shouldn't have to pay something that Vigor didn't bill -- or
17 Vigor didn't get billed for." Why? It's what it took to win
18 the lawsuit.

19 Lodestar doesn't talk about dismissing that, and there are
20 plenty of cases under Washington law where folks don't bill a
21 penny to their client, but they still get to recover their
22 fees, the idea being this: If we let Western off the hook on
23 this, what is it that they get? They get to pick a fight,
24 lose the fight, but then not have to pay the costs. Schwabe
25 eats it instead. Why? The fee provision is clear. It is

1 about a party's fees, and under the lodestar calculus, it
2 doesn't say "billed to clients," it says "realized value,"
3 hours times time fairly recorded.

4 THE COURT: Mr. Simms, once again, I don't need you
5 to restate everything you put down in your memo, but anything
6 you'd like to say in response?

7 MR. SIMMS: Yes, sir. The claimant isn't Schwabe
8 here. It's Vigor. Vigor never paid those fees. It was
9 never billed those fees. The Supreme Court is just awfully
10 clear about this, that there is -- we're not talking about
11 fee-shifting statutes. What we're talking about is the
12 contractual maritime law standard here and -- but just a
13 basic, basic claim, which is, if you're not billed for them,
14 you don't get them. I think Your Honor is -- yes.

15 We keep hearing about billing to Vigor, that sort of
16 thing, and our discovery motion also is out there. We
17 haven't talked about that specifically, but Western asked for
18 all the stuff, but what are the bills actually sent? What
19 are the payments actually made? Because you can only get
20 paid attorneys' fees for what you paid or what you're
21 responsible to pay, and that was never produced, never
22 produced. Asked for prior to -- way early in the case and
23 never produced.

24 So if Your Honor is going to be inclined to go past your
25 ruling that we talked about, there needs to be that

1 production. There needs to be that evidentiary hearing to
2 show that Vigor was actually billed this, that they actually
3 paid it, that the underwriters actually paid it.

4 What if we weren't -- even if Vigor can double recover the
5 attorneys' fees that the underwriters paid -- and by the way,
6 we're not -- we're not being asked to pay higher insurance
7 premiums. We're being asked to pay attorneys' fees. Okay,
8 fine. Are the attorneys -- are the premiums going to go down
9 if Vigor gets the money back? Is Vigor going to send the
10 money back to the insurers? We don't know.

11 But, at any rate, what if we were to see that these went
12 out to the underwriters and the underwriters came back, as
13 good underwriters often do, and say, "Well, you know, that
14 was a little bit high. Nah, you can't have that. That
15 expert spent too much time on it," so here's something that
16 was never paid that was -- by the people paying, so we've got
17 to have discovery on this stuff that we've asked for and that
18 wasn't responded to.

19 THE COURT: All right. Counsel, one final small area
20 that I want to get to, and that has to do with the expert
21 witness fees paid to Heger Dry Dock. I think about \$24,000
22 was paid by Vigor.

23 And then, Mr. Boyajian mentioned the fees paid by Vigor to
24 K&L Gates. Since the tow agreement includes a provision
25 stating, "Any costs not covered by insurance will be

1 allocated by degree of fault," shouldn't that apply in this
2 particular case to those amounts being asked, Mr. Boyajian?

3 MR. BOYAJIAN: No, Your Honor, because that comes in
4 the section talking about allocation of risk and loss, right?
5 That is separate from a clause further down the form, to
6 Clause 15 -- what, we move seven clauses later -- that talks
7 about costs and fees of litigation. It's not a capital-C
8 cost that's a defined term somewhere in this contract.

9 In Clause 8, they're talking about costs arising out of
10 accidents, arising out of insured losses or losses that
11 should be insured or aren't. When we get down to Clause 15,
12 we're talking about something entirely different. We're
13 talking about costs related to disputes and litigation
14 between the parties. It's not a capital-C defined term.
15 We're talking about two different things.

16 And I want to talk for a minute, too, about "double
17 recovery," which is a term that's been bandied about.
18 No one's looking for double recovery here. Vigor collected
19 \$40,000 out of \$415,000 it paid trying to cooperate with the
20 Oceanographic Administration, for a net wealth of, what, 375,
21 365? And now we're talking about, if they get fees, they get
22 a double recovery. No, sir. What they get is paid back for
23 what it cost to defend a fight they never wanted to have, a
24 fight they tried to avoid at every turn.

25 Western chose bare-knuckle litigation at a time when the

1 risk was highest, and now they don't want to pay for what it
2 costs to defend that fight. It's nonsense. The fact of the
3 matter is, yes, you know, I'm not here to give testimony, but
4 this recovery would flow back to the insurers, because they
5 are the ones that did pay most of these fees beyond the
6 deductible. It doesn't say in the tow contract you don't get
7 your fees if insurance paid them, and it doesn't say that in
8 the case law that Western cited either, Your Honor. So the
9 reality is, Vigor and its insurers, its underwriters, are
10 trying to get back what it cost to win the fight that Western
11 picked.

12 THE COURT: Any final comments, Mr. Simms?

13 MR. SIMMS: Well, okay, what we've established is
14 that underwriters paid everything over \$100,000. What we
15 don't know, but suspect, according to Ms. Cartwright's
16 testimony, is that much, if not all, of the \$100,000, less
17 60 percent, the Court awarded those attorneys' fees.

18 What we also know is that the NOAA issue was what Your
19 Honor dropped out on the initial summary judgment as not
20 ripe, okay? The NOAA issue may have been one of the gorillas
21 in the back of the case, but the front of the case was
22 \$187,000 that Western was entitled to, not -- loss or no
23 loss, according to the towage contract, and interestingly
24 enough, it is Vigor which has paid NOAA on its damages, and
25 that's in the record. Western still contests that it is

1 liable for any NOAA damages, but that's -- this was Western's
2 entitlement to \$187,000, loss or no loss, that Western was
3 entitled to receive and that Vigor refused to pay.

4 So, if the Court's inclined to award anything, there has
5 to be discovery on the question of who paid, but I guess what
6 we've heard is nothing was paid, except up to \$100,000 the
7 Court already awarded to Vigor, less \$60,000, and Western has
8 paid that.

9 MR. BOYAJIAN: Your Honor, if I may very quickly in
10 response to a few of those points? Your Honor's prior ruling
11 is on damages, not fees. It's not the same ruling. It
12 didn't discuss -- we didn't brief cases dealing with fees.
13 It had nothing to do with that question, as the question was
14 not before the Court, so let's not pretend that question is
15 put to bed. It may be on your mind, Your Honor, but it is
16 not put to bed.

17 And as to this point about discovery, there's not a single
18 case Western cites where this type of discovery is allowed,
19 not one, not from any single jurisdiction anywhere in the
20 country. Western cites cases about discovery related to
21 perjury, false statements, and bad faith. None of those are
22 about the quantum of fees, not a single one.

23 But what I will say all those cases do say is that, when
24 there's discovery on these issues, it's reciprocal. We have
25 produced our contemporaneous billing records and accounting

1 of costs. We haven't seen Western's. And if we are going to
2 talk about what is reasonable in this litigation, we would
3 need to see that to compare, and not just Mr. Simms', because
4 Western had different counsel prior to Mr. Simms' engagement.
5 Going all the way back to 2017, where I start the clock, that
6 was a letter from Western's prior counsel with a tender and
7 demand that we defend and indemnify. That's why I start at
8 February 13, 2017.

9 So, to the extent this Court is inclined to allow
10 discovery, which there is no support for that idea, but to
11 that extent, it ought to be reciprocal, because the
12 reasonableness of fees certainly ought to be viewed in
13 context.

14 MR. SIMMS: Your Honor, the --

15 THE COURT: That's okay. I don't need any further
16 argument. You answered the questions that I had about this,
17 and like I said, I'm quite familiar with the case. This is
18 an interesting argument from both sides because of, again,
19 what happened with all the NOAA specter and the NMSA specter
20 looming over all of this before we actually got to our
21 much-shortened trial.

22 So I will take your oral arguments into account and go
23 back and review some of the materials, sit down with my
24 clerk, and hopefully, we'll be able to get you an order here
25 fairly quickly.

1 MR. BOYAJIAN: Your Honor, if I may, one point that
2 is not argument?

3 THE COURT: Yes.

4 MR. BOYAJIAN: We'd like to concede three costs. In
5 preparing for this motion, I carefully reviewed Mr. Simms'
6 comments on our billing record, and there's three things that
7 I would like to concede. We'd be happy to file an amended
8 fee petition to reflect those deductions if it would help the
9 Court, but it's just three, and I suspect, with the court
10 reporter's record, we can take care of it.

11 One is, Mr. Howard charged a single dinner during trial.
12 He was preparing a witness, and he included that on the cost.
13 That is \$121.72.

14 I stayed at the Washington Athletic Club on February 16th,
15 '23. That was to come attend the appellate argument. That
16 inadvertently got included here. It's \$204.77. That is more
17 properly tacked to costs for appeal and shouldn't have been
18 included here.

19 And third, Your Honor, \$5,050 for fees that we wrote down
20 for preparing the notice of appeal documents. Those are
21 documents that get filed in your court, in the trial court,
22 Your Honor, but Mr. Simms raises the point that they are more
23 appropriately billed toward appellate fees, and I think he's
24 correct.

25 So we want to concede those three, and I want to make sure

1 the record reflects that. I know you said you were done.
2 This is not argument; this is concession.

3 THE COURT: Mr. Boyajian, thank you for that
4 clarification. I think it makes the record clear.

5 And just for your edification, the Court had already cut
6 every single one of those three.

7 Mr. Simms, enjoy your grandchild, enjoy San Francisco,
8 even though the weather may not be the best right now.

9 And, Mr. Boyajian, hope that you're doing well on the
10 Portland side.

11 And I'm glad we could do this by Zoom, even though many of
12 my colleagues don't like doing it. Some of my more
13 experienced colleagues that have been around for a bit longer
14 than me like to be in the courtroom, but not having to
15 travel, you know, that distance and stay in a hotel,
16 et cetera, for basically an hour-long argument I think makes
17 sense for something like this. Hope you're all doing well.

18 Madam Clerk, we will be at recess. Thank you.

19 MR. BOYAJIAN: Thank you, Your Honor.

20 MR. SIMMS: Thank you, Your Honor.

21 THE DEPUTY CLERK: Thank you.

22 (Adjourned.)

23

24

25

C E R T I F I C A T E

I, Sheri L. Schelbert, RMR, CRR, do certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

/s/ Sheri Schelbert

Sheri Schelbert